IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 202 OF 2006

M. Gopal of Bangalore,)
Indian Inhabitant, residing at 73/2, Nandi Durga)
Road, Jayamahal Extension, Bangalore-560 043)...Applicant

Versus

Mrs. Prerana A. Thakore of Mumbai,)
Indian Inhabitant, residing at 10th floor,)
Kaveeta Apartments, Next to Fariyas Hotel,)
Telephone Bhavan Lane, Colaba,)
Mumbai-400 005)..Respondent

Mr. Prasad Batavia, instructed by M/s. Juris Matrix, for the applicant.
Mr. Jal Andhyarujina with Mr. S.R.A. Shaikh, instructed by M/s. Thakordas & Madgavkar, for the respondent.

CORAM: SWATANTER KUMAR, C.J.

Judgment reserved on : April 20, 2007
Judgment delivered on: June 21, 2007

JUDGMENT:

The applicant claimed that he was involved in industrial and consultancy activities. The respondent is a major promoter/shareholder of the Companies operating under the names and style of M/s. Jayant Vitamins Limited and M/s. Rutvij Chemicals Limited. In terms of the

order of the High Court of Bombay, both these concerns had to shut down their activities and cease all operations. With the hope of reviving the Companies, the respondent executed a special power of attorney dated 7th July, 2005 authorizing the applicant to appear and represent the respondent before any Bank for the purpose of ascertaining the terms of negotiated settlement in respect of its liabilities towards the said financial institutions. On 3rd December, 2005, a Memorandum of Understanding (hereinafter referred to as "the MoU") was executed between the parties for revival of these companies. Clause 10 of the MoU provided for resolution of disputes by appointment of a sole Arbitrator in accordance with the terms and conditions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for short). Clause 10 of the MoU reads as under:

> " That in case of any disputes under this agreement the parties shall refer the dispute to a sole Arbitrator as per the provisions of the Arbitration Act, 1996 or such substituted Act as may be applicable at Mumbai".

A clarification to the above MoU was executed between the parties on 20th January, 2006. Pursuant thereto, the applicant had initiated necessary steps in furtherance to the said agreement and had spent lot

of money and time and claims to have put in his best efforts to revive the said Companies.

2. All of a sudden, the respondent, without any reasonable cause, issued a notice dated 19th September, 2006 , to the applicant unilaterally cancelling and terminating the said MoU. It is the case of the applicant that vide letter dated 25th September, 2006, the applicant pointed out to the respondent that there was no provision for terminating the agreement between the parties and action of the respondent was totally unilateral and impermissible. One of the instances given by the applicant to show that the MoU was acted upon and the applicant had spent lot of money and put more efforts, which was appreciated was that the applicant had filed a suit wherein Notice of Motion No. 676 of 2006 was taken out which is pending in the Bombay High Court. According to the applicant, there is wrongful and unilateral termination of the MoU and that this termination had given rise to disputes between the parties in regard to the MoU. Despite notice, the respondent failed to withdraw the notice dated 19th September, 2006, and did not carry out her obligation under the MoU. This resulted in issuance of a notice-cum-request by the applicant to the respondent on 10th

October, 2006, to concur with the appointment of a sole arbitrator amongst the list of arbitrators mentioned therein to resolve the disputes and/or differences. Despite receipt of the said notice on 12th October, 2006, at Exhibit-E, the respondent failed to respond, resulting in filing of the present application.

3. In fact, in the letter dated 9th October, 2006, written by the respondent to the applicant, false and baseless allegations were also made which itself became a dispute. In the affidavit-in-reply filed by the respondent, no dispute has been raised with regard to the existence of the arbitration agreement. The sole ground taken is that the agreement itself was terminated and once the agreement was terminated nothing survived and there existed no dispute which could be referred for adjudication to the sole arbitrator as claimed by the applicant. According to the respondent, the disputes are not arbitrable and as the applicant had failed to meet the threshold conditions for the commencement of the memorandum of understanding, no issue or dispute can be held to be arbitrable. While relying upon the judgment of the Supreme Court in the case of *S.P. Chengalvaraya Naidu (dead) by L.Rs.* vs. *Jagannath (dead) by L.Rs and others,* AIR 1994 S.C. 853, the

contention raised was that such a petition should be thrown out at the very outset as the applicant had withheld an important document. There is no dispute that the MoU was executed between the parties but the letter of termination dated 19th September, 2006, had put an end to the matter and much water had flown in the matter and having granted ample opportunity of nine months for the applicant to produce results and as nothing happened, the MoU was terminated.

4. As I have already noticed that the execution of the MoU is not in dispute and clause 10 of the said agreement specifically provides that any dispute arising from the agreement shall be referred to the sole arbitrator as per the provisions of the Act. The respondent has heavily relied upon clause 9 of the MoU dated 3rd December, 2005, to contend that in the event of default in complying with the terms in the manner laid down in the MoU and in no other manner by the applicant, the respondent shall not be responsible for any loss caused to the applicant, his associates or representatives. The essence of the agreement was for certain acts and deeds to be performed by the applicant for reviving the said two Companies, which had been closed as a result of court orders and he was to hold negotiations and

ascertain debts of the Companies, subject to negotiations with the secured creditors or otherwise. He was to make efforts for dealing with M/s. O.P. Mall & Associates for retrieving the complete management and control of the said two Companies. In addition to this, various acts and deeds were contemplated on the part of the applicant. In terms of clause 8 of the MoU, all expenses, past, present and future, relating to both the said Companies were to be borne by the said two Companies out of the Company funds. This, however, was modified by a clarificatory amendment to the MoU dated 20th January, 2006, wherein it was stated that all expenses pertaining to retrieval of the Companies from O.P. Mall & Associates for Mrs. Prerana A. Thakore through Company Law Bench proceedings would be borne by the applicant as also expenses for other proceedings under Articles 226 and 227 of the Constitution of India. This clarificatory amendment attempted to add certain terms to the original MoU dated 3rd December, 2005 and clearly shows that the parties had accepted the implementation of the original MoU dated 3rd December, 2005 and had chosen to add terms to the said MoU for its more effective implementation and with complete clarification in regard to incurring of expenditure for achieving the purposes of the MoU.

5. None of the parties has placed on record any correspondence from January, 2006 till the real dispute arose between the parties in September, 2006, and then suddenly vide letter dated 19th September, 2006, the respondent stated that she had considered the matter and would like to inform that Company Law Board route, as explained, was not acceptable and, therefore, MoU dated 3rd December, 2005 and clarificatory amendment dated 20th January, 2006, stood terminated.

6. It is clear from the above narrated facts and the documents on record that parties had executed and entered into a MoU dated 3rd December, 2005, which contained an arbitration under clause 10. Clause 10 contemplated reference of disputes between the parties to the sole arbitrator in accordance with the provisions of the Act. Thus, neither the execution nor existence of an arbitration agreement is in dispute. The argument of the respondent before the Court is that no losses could be suffered by the applicant and the question of termination itself was not a referable dispute. Once the MoU was terminated, that would put an end to the entire contract in toto and no

agreement would subsist so as to make a reference to the arbitrator. This contention is without any merit inasmuch as in the application specific allegations have been made by the applicant to show that he had incurred various expenses for taking steps in furtherance to the MoU and had approached various authorities including taking steps in Notice of Motion No. 676 of 2006 in the High Court. While entertaining an application under Section 11 (6) of the Act, the limits of jurisdiction do not permit the Court to go into the merits of the dispute. Such jurisdiction is a very limited one. Keeping in view the principle enunciated by the Supreme Court in *SBP & Co.* Vs. *Patel Engineering Ltd. and another* , *[(2005) 8 SCC 618],* the Court can go into various questions of law relating to existence of any dispute, claims being barred by time and/or there being no arbitration agreement, etc. The contentions raised on behalf of the respondent are clearly based upon the merits of the dispute and the extent to which such claims would be permissible. The reliance placed by the respondent on the judgment of the Supreme Court in the case of *India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd.* [(2007) 136 Com.Cases 621 (SC)] is misconceived inasmuch as the principle stated by the Supreme Court in that case was that an arbitration agreement would mean an

agreement which is enforceable in law and when a question in regard to the validity or otherwise of the arbitration agreement arises, the Court would have to go into that question particularly where the plea of fraud is taken. That certainly is not the case here as there is not even a mere reference to the plea of fraud in the reply filed by the respondent. In fact, the parties have clearly admitted execution of the said MoU and the clarificatory amendment dated 20th January, 2006.

7. It may be noticed here that after lodging this application in this Court, even the respondent, through her advocate on 13th April, 2007, had responded to the letter dated 10th October, 2006. Referring to the panel of Arbitrators suggested in that letter, they have stated that they would have no objection if Mr. S.R. Shah, retired Judge, is appointed as sole Arbitrator. Of course, this averment was made by taking up an objection that the matter is not arbitrable. The counsel appearing for the respondent, during the course of hearing, submitted that the respondent had no objection to the appointment of the said sole arbitrator.

8. In view of the above, there is no merit in the objections taken by the respondent. The same are hereby rejected. Mr. S.R. Shah, retired Judge, is appointed as sole Arbitrator. Application is accordingly disposed of. No order as to costs.

CHIEF JUSTICE